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ABSTRACT

Language minority students are legally entitled to a baseline opportunity for an adequate, affirmative, appropriate, and effective education, allowing them an "equally fair shot" at a high school diploma. Certain absolute legal standards for this baseline educational entitlement are posited to exist; this claim is supported by complementary analyses of (1) the right to equal educational opportunity under the equal protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964; and (2) protected interests under the due process clause of the Fourteenth Amendment. A synthesis of these two legal analyses reveals that equal educational opportunity presupposes some entitlement to minimum quantity and quality of education. In practice, this means that planning, diagnostic, and program requirements must work to allow second language minority students to participate effectively in the regular instructional program. It is observed that the establishment of such a baseline standard of educational adequacy provides an objective basis for educational malpractice litigation, since states and school districts must demonstrate that they have adequately, affirmatively, appropriately, and effectively instructed the student in all the skills, concepts, and courses required for high school graduation. (TE)

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THE RIGHT OF LANGUAGE MINORITY STUDENTS TO A FAIR SHOT AT A HIGH SCHOOL DIPLOMA: A LEGAL ANALYSIS

Marsha J. Hirano-Nakanishi and Elizabeth Osthimer

INTRODUCTION

In Brown v. Board of Education, the Supreme Court recognized a Constitutional right to "equal educational opportunity."[1] Twenty years later in Lau v. Nichols, the Supreme Court was called upon to define the parameters of an equal educational opportunity for minority students with limited English language proficiency.[2] The Court in Lau held that the right to an equal educational opportunity, pursuant to Title VI of the Civil Rights Act of 1964, entitles language minority students to more than just ". . . the same facilities, textbooks, teachers and curriculum . . ." provided to other, English-speaking students.[3] In the nearly thirty years after Brown and in the decade after Lau, the courts, lawmakers and educators have tried to determine what really constitutes an equal educational opportunity for all students, including language minority students.[4]

The Concept of Equal Educational Opportunity

Equal educational opportunity has been analyzed along several dimensions. Some have defined it in terms of "inputs," and argue that each student is entitled to an equal share of the available educational resources.[5] Resources in this regard have included more than considerations of total per-pupil expenditures: Teachers, textbooks, facilities and the racial composition of a school have all been classified as "educational inputs" by the courts.[6]

Equal educational opportunity also has been analyzed in terms of "outcomes," usually in terms of how well a student does in school or performs on a standardized test.[7] One type of outcome analysis places a heavy priority on the actual equalization of student performance levels on tests or other measures of academic achievement. Under another type of outcome analysis, students do not have to demonstrate

that they have actually done "equally well" in school, but the court must be satisfied that they have received "equal benefits" from the instructional program offered to them.[8] Under either type of outcome analysis, it often is emphasized that different, and possibly unequal, educational inputs may be required to ensure "equal" benefits or performance.

Whether couched in terms of inputs or outcomes, the concept of equal educational opportunity embraces a particular analytic framework and a corresponding standard for assessing a state's or a school district's provision of educational opportunities.[9]

Equal educational opportunity for language minority students has been expressed primarily in terms of equal benefits. For example, in Lau, the Court held that educational inputs for language minority students must be tailored to their language-related needs to ensure that they participate on an equal basis in the instructional program.[10]

Relative Standard Analysis

Simplistically, equal opportunity means that when providing an education to all students, a state is required to provide an equal educational opportunity to its language minority students. The extent to which this obligation is met is determined by comparison; using a relative standard for assessing equal opportunity: One asks, "Did language minority student X receive equal benefits from the education vis-a-vis student Y?" In the event that the two sides of this equation match up, the state has discharged its responsibility under an equal opportunity mode of analysis.

The obvious drawbacks to this relative standard analysis of equal opportunity are perhaps best summarized in the form of questions: What happens when a language minority's educational opportunity is determined to be equal to the opportunity afforded other students, but both sets of opportunities are equally poor or of low quality? Does an "equal educational opportunity" for language minority students carry

with it any guarantee to some minimal level, or baseline, educational opportunity? If a baseline educational opportunity exists, how is it assessed and delineated?

The Concept of Baseline Level of Education

Answers to these questions are not found in the legal literature on language minority education. The concept of a language minority's right to a baseline level of education has not been recognized nor developed by legal analysts.[11] Although the relative standard for assessing and delineating the language minority student's educational opportunity has been developed, there has been little judicial development on the absolute notion of a floor or baseline below which an equal opportunity, by definition, cannot fall.[12]

Despite the limited discussion of a language minority's right to a baseline educational opportunity, the courts have not been completely silent on this issue. In San Antonio Independent School District v. Rodriguez, the U.S. Supreme Court stated that all students may be entitled to some baseline educational opportunity.[13] More specifically, the Court acknowledged that "some identifiable quantum of education" may be a constitutionally protected prerequisite to the meaningful exercise of rights embodied in the Constitution.[14] However, since the issue of whether plaintiffs received a baseline educational opportunity was not before the Rodriguez Court, no attempt was made to define the parameters of the "constitutionally protected quantum" of education required for a baseline.[15]

Overview of the Present Analysis

In the present analysis, impetus is taken from the Rodriguez Court's acknowledgment. It is argued that language minority students are legally entitled to a baseline educational opportunity. Furthermore, certain absolute, as opposed to relative, legal standards are posited to exist which will help to assess and give substance to this entitlement. In the present argument, this baseline educational entitlement is viewed theoretically in two complementary ways: As a

right that is logically and inextricably embedded in any meaningful articulation of a right to equal educational opportunity, and as part of a student's protected interest in education subject to procedural due process protections.

The first section of this analysis presents a discussion of baseline educational entitlement in reference to the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunities Act of 1974.[16] The right to equal treatment, articulated in the Constitution and in these statutes, is reformulated as embodying an underlying right to a baseline educational opportunity. It is argued that these extant legal standards require the provision of a baseline education to language minority students. They also help to specify the form and content of language minority educational offerings. More specifically, standards requiring "affirmative," "appropriate" and "effective" education are analyzed in light of Lau v. Nichols, Title VI of the Civil Rights Act of 1964, an HEW May 25th Memorandum interpreting Title VI, and the Equal Educational Opportunities Act of 1974 (EEOA).[17]

The second section presents an analysis of baseline educational entitlement in reference to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[18] It is argued here that all students, including language minority students, have protected interests in education that cannot be abridged without adherence to certain notions of fairness. Within this view of the right of language minority students to a baseline educational opportunity, a standard requiring "adequate" education is identified and analyzed specifically in terms of state statutes that delineate minimum requirements for high school graduation, state statutes that mandate minimum competency testing (MCT) programs and the District Court and Fifth Circuit Court of Appeals decisions in Debra P. v. Turlington.[19]

The third section presents a synthesis of the two foregoing complementary analyses, revealing certain baseline standards which require the provision of adequate, affirmative, appropriate and effective education for language minority students. The synthesis posits that language minority students have a right to "a fair shot" at the high school diploma.

The fourth and final section of the analysis presents conclusions which follow from the discussion of the language minority baseline educational entitlement and standards.

BASELINE EDUCATIONAL RIGHT: AFFIRMATIVE, APPROPRIATE AND EFFECTIVE EDUCATION

The constitutional right to "equal treatment under the law" is embodied in the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[20] The Equal Protection Clause requires that similarly situated persons be treated in a like manner by the state. Laws that categorize or classify individuals with the purpose of treating them differently or laws that impinge on some constitutionally recognized right or interest are reviewed by the courts under the Equal Protection Clause. If a state seeks to enforce a law that will result in unequal treatment on the basis of a suspect classification (e.g., race or national origin) or a law that will affect a fundamental interest (e.g., the right to vote), the courts will strictly scrutinize that state action, and the state will bear a heavy burden of persuasion and proof against any challenge to the constitutionality of the law.[21] In brief, then, the Equal Protection Clause guarantees equal treatment with regard to race, national origin and other constitutionally suspect classifications, and it also guarantees equal treatment with respect to certain fundamental interests explicitly recognized in the Constitution.[22]

Some analysts have suggested that focusing primarily on equality creates conceptual confusion; such focus assumes the existence of certain rights and entitlements, then proceeds directly to the

discussion of relative equality or inequality of treatment without specifically addressing the nature and scope of the assumptive entitlements.[23] Although the Supreme Court in Brown recognized a right to equal educational opportunity, such a right, as recognized and analyzed to date, has not explicitly carried with it any corresponding right to some clearly defined particular type or minimum level of education.[24]

Common sense, if not the courts, tells us that some notion of a minimum-level, or baseline, education is required to give the concept of educational equality meaning and substance.[25] If the right to equal educational opportunity is not premised on the recognition of some entitlement to a minimum quantity or quality of education, then it becomes an illusory guarantee with no substantive content of its own: Equal opportunity easily can result in equally onerous, unfair, irrational or harmful policies.[26]

Conceptually, we can analyze and interpret various statutes and court decisions, as providing language minority students with an underlying right to a baseline educational opportunity. While not fundamental in nature, such a notion of baseline underpins and gives substance to the right of language minority students to equal educational opportunity.[27]

Statutory Rights

A number of federal statutes establish that there is an underlying right of language minorities to affirmative, appropriate and effective education, implicit in the statutory entitlement to equal educational opportunity.

Specifically, Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color or national origin in any program receiving federal financial assistance.[28] In 1970, the Department of Health, Education and Welfare (HEW) issued the May 25th

Memorandum, a clarifying guideline to one of its Title VI regulations.[29] The May 25th Memorandum, requires that where inability to speak and understand the English language excludes national origin minority students from effective participation in the educational program, the school district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.[30] The Equal Educational Opportunities Act (EEOA) states that "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by language minorities in an instructional program constitutes an impermissible denial of equal educational opportunity."[31] These federally-guaranteed statutory rights of language minority students to equal educational opportunity are interpretable within a frame of reference that focuses on a language minority student's right to some type of baseline education rather than focusing on the acknowledged right to equal educational opportunity.[32]

While these statutes obviously were drafted to ensure equal educational opportunity for all students, they also contain language which establishes the notion that there is a floor, or baseline, education below which no language minority's equal opportunity can sink. Title VI and the May 25th Memorandum presume the existence of a school district "regular" instructional program with specified progress markers and ends, or outcomes, towards which affirmative instructional steps must lead language minority students. Furthermore, Title VI and the May 25th Memorandum specify effective participation as a standard by which to determine whether or not language minority students are being afforded a baseline educational opportunity. The EEOA likewise assumes there is a regular instructional program. In this case, appropriate action is the standard by which assessments are made regarding the provision, or non-provision, of a baseline educational opportunity.

Interpretation of Statutory Rights in Court Decisions

Although the Rodriguez Court suggested a constitutionally protected quantum of education, it provided no guidance in defining parameters of a baseline educational opportunity. Analysis of court decisions focusing on statutory interpretation provides such guidance.

The Supreme Court in Lau v. Nichols held that the total failure of a San Francisco school district to address the educational needs of limited-English, Chinese-origin students contravened the dictates of Title VI and the May 25th Memorandum.[33] Although the Court did not specify what the district must do to meet its obligation to these students under Title VI, it was clear that some sort of special assistance was required.[34] The Court held that language minority students are entitled to equal benefits, and not merely the "same" inputs in terms of their educational experience. The Lau decision recognized that language minority students have a right to an opportunity for effective participation in the regular instructional program.

The Lau decision was based in large measure on the May 25th Memorandum. Specifically, the Memorandum requires a particular combination of affirmative steps to "rectify the language deficienc ies " of limited English proficient students. This has been interpreted to mean that a school district must offer special language assistance to limited English proficient students and also must help the students to attain mastery of specific skills and subject content areas so that students can effectively participate at their appropriate age and grade level.[35] The rationale for requiring more than just language assistance to "rectify the language deficienc ies " of language minority students stems from the fact that as a direct result of their English language deficiencies, these students have suffered by missing out on certain substantive areas of instruction. The Memorandum refuses to allow language minority students to be penalized in their education and, in fact, specifies that English language instruction is just one component of a language minority student's

educational entitlement: A school district or state must offer a specific two-pronged instructional program, including special language assistance and regular content and skills instruction.[36]

In Rios v. Reed, the Court also based its decision on the May 25th Memorandum. In addition to requiring affirmative steps, the Memorandum specifies that these steps must be effective.[37] In Rios v. Reed, plaintiffs sought information from a local school district in an effort to assess whether the affirmative steps taken by the schools promoted academic progress and English language proficiency in language minority students such that these students could effectively participate in the regular educational system of the district.[38] Defendant school officials claimed that only "affirmative" steps were required pursuant to Lau and Title VI, and maintained that an investigation of facts directed toward the effectiveness of those steps was irrelevant.[39] The New York Eastern District Court in Rios disagreed, stating that "it is not enough simply to provide a program." An ineffective program, it found, was "as harmful to a child who does not speak English as no program at all."[40]

In Castaneda v. Pickard, the Fifth Circuit Court of Appeals held that the EEOA imposes a duty on states and school districts to take "appropriate action" to meet the needs of language minority students.[41] The EEOA was enacted by Congress to codify the precepts of Lau, Title VI and the May 25th Memorandum and to extend the precepts as an affirmative obligation to all states and school districts, regardless of whether or not federal funds were involved.[42] However, unlike Lau, Title VI or the Memorandum, the EEOA coins an appropriateness standard: it specifies that appropriate action for language minority students must be taken.[43] The Castaneda Court noted that Congress, in enacting the EEOA, did not provide guidelines by which to judge if a particular program is appropriate, and went on to enunciate its own. First, the court stated that state action is appropriate when it includes appropriate planning:

1) It is based on sound educational theory, and

2) The program that was developed to implement the theory is reasonably calculated to do so effectively.[44]

Second, the Castaneda Court specified that an appropriate assessment program for language minority students must assess both the student's English language proficiency and his or her knowledge of substantive content and skill areas.[45] The Court felt this was necessary in order for a school district to determine the specific needs of the individual student, whether for special language assistance, academic instruction to fill in content area knowledge gaps, or a combination of both. This component parallels the two-pronged instructional program that must be provided under the "affirmative steps" standard expressed in the May 25th memorandum and discussed earlier.

Finally, the appropriateness standard enunciated by the Castaneda Court reiterates that the instructional program provided to language minority students must work in preparing students for effective participation in the standard instructional program of the school district.[46] If the program fails, the actions of the schools may no longer be appropriate.[47]

In effect, then, the Castaneda decision established that an appropriate education for language minority students includes the affirmative steps and effectiveness standards enunciated in Lau, Title VI and the May 25th Memorandum, as well as components related to planning and assessment.

Other federal courts have followed along similar lines of judicial reasoning and interpretation. In Cintron v. Brentwood Union Free School District, the Court recognized the Title IV and EEOA mandates to provide language minority students with appropriate language assistance and basic instruction required for effective participation in a regular instructional program.[48] Among other factors, the assistance provided language minority students in the defendant school district did not have clearly established criteria nor instructional objectives that

would have helped to ensure that such students could eventually and effectively participate in the district's regular program of instruction.[49] As such, the Cintron Court determined that the educational program for language minority students offered by the school district violated Title VI and the EEOA.[50]

In U.S. v. Texas, the Fifth Circuit Court of Appeals stressed another aspect of appropriateness as enunciated by Castaneda. The Fifth Circuit Court determined that the District Court's treatment of the EEOA claims in the case were not consistent with the standard enunciated in Castaneda: The Castaneda standard that appropriate education for language minority students has to "work," that is, has to be effective, was not applied in assessing the educational program actually provided to the students in Texas.[51] The Fifth Circuit Court of Appeals reversed and remanded the District Court decision.[52]

Summary

Under the EEOA, Title VI and the dictates of Lau, language minority students are entitled, at base, to an affirmative, effective and appropriate education. Further, the analysis of this baseline entitlement specifies several components of an affirmative, effective and appropriate education for language minority students:

1) The instructional program must be based on sound theory and developed to implement the theory effectively, including the establishment of criteria and instructional objectives;

2) An assessment program must evaluate students' English language proficiency and knowledge of substantive skill and content areas in order to determine the specific instructional needs of each individual student;

3) A two-pronged instructional program, consisting of special English language assistance and of skills and content instruction, must be provided to prepare students for effective participation in the regular instructional program; and

4) The instructional program must "work" to allow students effective participation in the regular program of instruction.

The first two components broadly specify planning and diagnostic requirements of the baseline educational opportunity for language minorities. The third specifies both the program components and the goal of language minority instruction. The fourth states that the simple provision of an instructional program meeting these requirements is not enough: The program also has to work toward the specified end of enabling language minority students to effectively participate in the regular instructional program of the schools.

BASELINE EDUCATIONAL RIGHT: ADEQUATE EDUCATION

The Due Process Clause of the Fourteenth Amendment of the Constitution states that "no state shall . . . deprive any person of life, liberty, or property without due process of law."[53] Rights deriving from the Due Process Clause can generally be categorized as either procedural due process or substantive due process rights. The basic issue that concerns us here is a procedural due process notion; specifically, that a protected interest cannot be arbitrarily infringed or taken away by the state without adherence to some sort of procedures designed to ensure that the state's action is fair and not arbitrary.[54]

Protected Interests

Scrutiny of state action under the due process clause will take place only if a protected interest is at stake. In education a number of protected interests have been recognized in legal analysis. The Supreme Court recognized a "property" interest in education in Goss v. Lopez when it ruled that "the state is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause."[55] In recognizing this property interest, the Court acknowledged that students, in a sense, "own" their

education, at least insofar as the state can not take their "property" away from them without being fair about it.

The property interest in education is not the only type of educational interest recognized in legal analysis. There also is a student's "liberty" interest. Students, it is argued, should be free from the stigma associated with failure in school when failure is wrongfully or arbitrarily imposed, because the school has been unable to accurately or adequately assess student performance.[56] In "right to treatment" cases involving mentally ill patients who are institutionalized, there is a recognized liberty interest that requires that patients be given something, i.e., treatment, to compensate them for their deprivation of liberty. By analogy, analysts have argued that students who are compelled to attend school for a specified number of years under compulsory education laws have a "right to treatment." These writers argue that students are entitled to something, e.g., an educational "quid pro quo," or some sort of baseline education in exchange for their liberty.[57]

Most recently, the concept of a protected interest in education has been combined with compulsory school attendance laws and the significant potential deprivation of a high school diploma pursuant to minimum competency testing (MCT) programs. This combination has been recognized by a Federal District Court in Florida and by the Fifth Circuit Court of Appeals in Debra P. v. Turlington as invoking the protection of the Due Process Clause.[58]

Whatever the specific formulation of the interest--whether as a "liberty," "property," or simply "protected" interest--it is clear from this discussion that the Rodriguez acknowledgment of a protected minimum educational quantum easily can be viewed as providing students with some baseline educational entitlement to which due process protections apply.

Under the due process framework, states which provide education cannot unfairly deprive students of their "protected interest" in an education. Courts have been reluctant to delineate the standards by which such deprivation can be established, but virtually every state legislature, state board of education and local school district has done so.[59]

Every state establishes certain minimum requirements for high school graduation which are often amplified or further specified by local school boards.[60] Nearly forty states have enacted minimum competency testing (MCT) legislation or administrative regulations, requiring high school students to demonstrate minimum proficiency in certain "basic skills": usually reading, writing, basic math, and in some cases, "life skills," e.g., filling out a job application or a W-2 form.[61] In seventeen states, students must pass these tests, in addition to completing specified course requirements, in order to qualify for high school graduation and a diploma.[62] These statutes and regulations reflect the individual states' attempts to establish objective standards against which to assess student progress for the purpose of awarding or denying students a particular quantum of education--the high school diploma. As analysis of recent decisions by a Federal District Court in Florida and the Fifth Circuit Court of Appeals in Debra P. v. Turlington will demonstrate, in delineating certain "fairness" requirements with respect to the denial of the high school diploma, students' baseline educational entitlement can be seen, in part, as a right to adequate education in the basic skills and subject content areas required for high school graduation.

Adequate Instruction

The Debra P. v. Turlington decision established one critical standard for a baseline educational opportunity: adequate prior instruction in the subjects and skills that are covered on a minimum competency test required for high school graduation.[63]

In conjunction with a minimum competency testing challenge, the District Court in Debra P. v. Turlington held that the plaintiffs in that case had a right to graduate from high school with a standard diploma, provided that they met all requirements for graduation exclusive of the minimum competency test.[64] The Court stated that the combination of compulsory attendance, "obvious inadequacy" in prior instruction in the objectives which were tested, lack of sufficient notice of the test and its sanctions for students already in high school at the time, and the students' protected interest in education, resulted in finding that the students' constitutional rights were violated, insofar as the state withheld their diplomas based on their test failure.[65]

The implementation of the "fundamentally unfair" minimum competency testing program was deemed unconstitutional under the Due Process Clause of the Fourteenth Amendment by the Fifth Circuit Court of Appeals.[66] In upholding the District Court's decision, the Appeals Court further held that "fundamental fairness" necessarily requires more than just adequate notice and standard psychometric validity of the minimum competency test. The Court held that "fundamental fairness" requires that the test reflect only that which was actually taught to the students.[67] The Fifth Circuit decision in Debra P. held that students must be adequately instructed in the specific skills and objectives for which the state seeks to hold them accountable by virtue of a minimum competency test.[68] In other words, a school district must demonstrate having actually and adequately taught the material to students prior to administering a test used for denying a high school diploma.

The requirement of a "match" between a minimum competency test and actual instruction has been analyzed at some length in the legal and educational literatures.[69] Basically, a specific sort of "match" is required for all students. The test does not have to be matched to the curricular requirements for high school graduation. Just because a student is required to pass a course in U.S. History, the MCT does not have to pose questions on the Civil War. Nor does the MCT have to

reflect the overall emphasis or content of the curriculum. Instead, the state must be prepared to demonstrate that whatever is on the test was actually taught in an adequate manner.[70]

Further, particularly in light of the trial court's discussion of due process protection to which students are entitled in a MCT-for-diploma program,[71] adequate instruction implies some sort of sequential instruction designed to afford students a fair opportunity to acquire proficiency through an appropriate developmental process. Adequate instruction also implies that a school district must offer students the opportunity to review targeted materials at a time prior to administration of the test, particularly if students have not mastered an objective.

The same adequate prior instruction standard can be applied, by analogy, to the curricular courses (e.g., U.S. History, General Math) required for high school graduation. Although the Debra P. decisions did not apply to the state's efforts to hold students accountable for certain subject content areas, by virtue of minimum high school graduation requirements, students logically should be instructed in the subjects that they are required to pass in order to graduate from high school. The Debra P. decisions stand for the proposition that a school district, in order to comport with the requirements of fundamental fairness imposed by the Due Process Clause, must be able to demonstrate that what was required for high school graduation in the form of an MCT, was taught to the students. It seems equally fair to require a district to demonstrate having actually taught the information and skills covered in required courses prior to denying a diploma on the basis of not having such required courses.[72]

Summary

All students, including language minority students, have protected interests in education subject to the requirements of fundamental fairness imposed by the Due Process Clause. By virtue of fundamental fairness, if the state and school districts impose test and curricular

requirements for high school graduation, all students have the right to sufficient notice of requirements for graduation, the right to psychometrically valid testing in relation to graduation requirements, and, most importantly, the right to adequate instruction, as delineated above, designed to enable students to receive a high school diploma. Applying this standard of adequate instruction results in the recognition of the right to be instructed adequately in the skills and content that are covered on minimum competency tests and courses required for high school graduation.

SYNTHESIS ON THE BASELINE RIGHT: A FAIR SHOT AT A HIGH SCHOOL DIPLOMA

For decades, the plaintive cry that "Johnny can't read" has been heard throughout the United States. Under a simple formulation of equal opportunity, if "Johnny can't read" and "Juanito no puede leer," there is little legal concern. Each child is benefitting equally from his education, and the right of the language minority student to equal educational opportunity has been discharged. But such a position suggests that educational opportunity can be poor, albeit equally so. This analysis has attempted to address the glaring need for students, particularly and specifically language minority students, to have a recognized entitlement to some floor or baseline in education below which equal educational opportunities cannot fall.

This analysis began by considering the language minority's entitlement to a baseline education from the perspective of equal opportunity. Under this mode of analysis, it was argued that the right to equal educational opportunity must be premised on the recognition of some entitlement to a minimum quality or quantity of education, or else the right to "equal educational opportunity" is an illusory and meaningless entitlement.

With respect to federal statutes guaranteeing equal educational opportunity, language minority students' underlying baseline right to education is an entitlement to affirmative, effective and appropriate

education. A language minority's right to an affirmative, effective and appropriate education, as developed in this paper, did not specify a preference for bilingual, ESL, or other identified methods of instruction. Instead, analysis of the baseline entitlement identified planning, diagnostic and program requirements of an affirmative, effective and appropriate educational program for language minority students--all of which must work in an interrelated fashion to allow language minority students to participate effectively in the regular instructional program of the school system. For greater descriptive clarity, the baseline educational entitlement to an affirmative, effective and appropriateeducation can be coined "the right to effective participation in the regular instructional program of the schools."

While this equal opportunity analysis goes some distance in delineating the language minority's baseline educational entitlement, a missing component in the analysis involves the definition of where the baseline educational program is supposed to lead and under what circumstances. In other words, the right to effective participation in the regular instructional program outlined in this analysis lacks a specified end. What is "regular instruction" supposed to provide to students? What are students supposed to achieve by virtue of proceeding through a regular program of instruction?

To link effective participation to a specified end, one can develop hypothetical constructions: For example, "effective participation in the regular instructional program" "in which all students will achieve an eighth grade reading level," or "in which all students will successfully pass a minimum competency test in basic skills." A baseline educational entitlement constructed in these ways could be coined a "right to read" or a "right to minimum proficiency in basic skills."

Complementary to the equal opportunity analysis, discussion of the baseline educational entitlement argued that under a due process formulation, education is a protected interest which cannot be

arbitrarily infringed or taken away by the state without adherence to procedures designed to ensure that the state's action is fair. Analysis of the Debra P. v. Turlington decisions provides the missing baseline educational entitlement standard. To the extent that states and school boards have specified baseline test and curricular requirements for graduation from high school, application of fundamental fairness requires that the state provide all its students with sufficient notice of these high school graduation requirements, psychometrically valid assessments in relation to graduation requirements and, most importantly, adequate education. Students' right to adequate education, in essence, means that all students have a right to a program of instruction which actually teaches the skills and content covered on minimum competency tests and in courses required for high school graduation in an appropriate developmental sequence and with the opportunity for review.

Under the equal opportunity analysis, it was argued that a baseline right must underlie the right to equal opportunity for the notion of equality to carry any true meaning: There must be a baseline or a floor entitlement to ensure that students do not receive equally poor or offensive opportunities. The due process analysis further supports this line of argument: Education is viewed as being subject to the principle of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment. While not specifically prohibiting equally poor educational opportunities, the due process analysis subsumed into the equal opportunity analysis prohibits equally unfair educational opportunities.

Merging the due process analysis with the equal opportunity analysis, then, dictates where the regular program of instruction must lead and under what conditions: To the extent that states and school boards impose baseline requirements for graduation from high school, and in order for states and for school boards to meet the requirement of fundamental fairness, the regular program of instruction must adequately teach the skills and content covered on minimum competency tests and in courses required for high school graduation. The

synthesis, in brief, provides language minority students with a right to a "fair shot" at any test or curricular requirement for receipt of the high school diploma.

The Debra P. Court adopted just such a formulation and synthesis in its determination that denial of diplomas based on an unfair test violates the Equal Protection Clause of the Constitution.[73] The Court stated that the test had to be a "fair test of that which was taught." The Court stated that if the test was not fair (i.e., if it did not comport with the kinds of due process protections outlined above, and specifically, if it did not cover material adequately taught to the students), then it could not be rationally related to a state interest (i.e., it would be in violation of the Equal Protection Clause).

In effect, the Debra P. Court stated that due process violations of the type described establish an equal protection violation. If the test isn't fair, it violates the Equal Protection Clause, even without strict judicial scrutiny of a suspect class and without recognition of education as a fundamental interest, because an unfair test cannot be rationally related to a state interest.

The present analysis follows along the lines of the Debra P. decisions. Equality in education is meaningless without some bottomline notion of quality in education. The baseline constitutionally acceptable "quality" education envisioned by this analysis and by the Debra P. decisions is simply adequate instruction in the materials and subjects, if any, required by a state or school district by virtue of a test or curricular requirements for high school graduation with a standard diploma. Moreover, this analysis argues that the minimally acceptable "quality" of education for language minority students, under applicable federal law, is education that is affirmative, appropriate and effective. Combined, these analyses state that the minimally required, or baseline, educational entitlement for language minority students is a right to adequate, affirmative, appropriate and effective education in those skills and subjects, if any, required for a high school diploma.

The analysis does not assert that Juanito has a right to read at the eighth grade level as his baseline educational entitlement, anymore than Johnny has this right. However, if states or school boards will deny high school diplomas on the basis of students not demonstrating eighth grade level reading achievement, then school authorities must demonstrate equally fair opportunities or equally "fair shots" at the high school diploma.

What does the student right to an "equally fair shot" at a high school diploma mean? In a general sense, it means that courts, at this time, have not specified one absolute baseline standard, e.g., an eighth grade reading level. Instead, states and school boards set whatever baseline requirements for graduation that local political processes will allow.[74]

More importantly, a "fair shot" at a high school diploma does not require that every student receive the diploma. That is, the baseline educational entitlement does not require that all students must meet local baseline standards for graduation. Rather, the act of teaching and instruction, while interrelated with student demonstration of learning or meeting requirements, is viewed as a separate act subject only to fairness principles. There is responsibility on the part of the schools to adequately instruct all students towards a high school diploma, yet it allows that some students, although adequately taught, may be denied the diploma. Given a fair shot, it is not difficult to list any number of reasons why a student would be denied a diploma, e.g., students could fail to do classwork and homework or students could "cut" numerous classes without excuse. Hence, this construction of a student's baseline educational entitlement follows the trend of the judiciary in acknowledging that even best educational efforts may not always result in certain guaranteed student outcomes.[75]

Finally, and most importantly to this analysis, an "equally fair shot" at the high school diploma does not mean the same thing for both language minority students and other students. "Regular," or non-language minority, students under this synthesis are entitled to a baseline educational opportunity as discussed in the due process protections section of this paper. Language minorities are further entitled to educational offerings that meet certain federally-imposed standards: They are entitled to an affirmative, effective and appropriate education. These standards interface with the standard of adequacy and the notion of fundamental fairness, resulting in a language minority right to a "fair shot" at a high school diploma.

CONCLUSION

The baseline educational entitlement of language minority students to a "fair shot" at the high school diploma has been discussed here in broad terms. The purpose of this paper was to analyze the legal basis for a baseline, in addition to an equal educational opportunity for language minority students, and to establish the existence of extant standards for language minority education that generally require a "fair shot" at a high school diploma.

Earlier in this paper it was asked whether the language minority student is entitled to more than an opportunity <u>equal</u> to that afforded to other students. Specifically, the paper questioned whether the language minority student is entitled to some baseline educational opportunity that can be independently and objectively defined. In short, is there some floor beneath which no language minority student's education can sink? The baseline opportunity analysis presented in this paper answers this question affirmatively by strengthening and supporting extant equal opportunity analysis. Additionally, the baseline opportunity analysis may pave the way toward expanding legal analysis in education in a critical area--educational malpractice.

Courts have refused to recognize that states or school districts have a duty to educate their students that can be enforced through actions for educational malpractice.[76] An action for educational malpractice involves establishing: (1) that school districts or states have a duty to provide their students with a level of instruction that can be measured against some objective standard, (2) that they breached that duty, and (3) that the harm thereby suffered by the student was proximately caused by the breach of duty, or malpractice, on the part of the educators.[77] Courts have been unable to find these requisite elements in actions brought to date, and have been extremely reluctant to move in the direction of recognizing this cause of action. Most particularly, courts have been unable to find that school districts and states have a duty to provide their students with a level of instruction that can be measured against some objective standard.[78] However, the recognition of a "fair shot" at a high school diploma for language minority students opens up the entire question of a school district's duty to educate its students at some minimal level of adequacy.

The standard of adequacy enunciated by the Debra P. Courts involves imposing an objective standard of care on the educational system that poses no greater burden on states than that which they carve out for themselves by setting objective requirements, either in the form of minimum competency tests or specific subjects for high school graduation. Since school districts and states are required to take affirmative steps to meet the needs of language minority students under federal law, in the event that they establish regular instructional and assessment programs, they are required to ensure that language minority students can participate effectively in those programs. A state or district could be susceptible to an educational malpractice claim on behalf of language minority students, in view of the state's affirmative duty, and the objective standards for students established by the state or district in the form of MCT or high school graduation course requirements, if the language minority student was not provided with a "fair shot" at the high school diploma.[79] Since this analysis has provided delineation of components for the language

minority student's baseline educational entitlement pursuant to the notion of a fair shot at a high school diploma, in the event that the state or district falls short of minimally providing a fair shot, the state or district could be liable under a theory of educational malpractice or, alternatively, under the view that such action (or "inaction," in this case) violates the Title VI and the EEOA requirements to "effectively" educate language minority students.[80]

The discussion here has simply tried to cement a legal floor beneath which no language minority's education can fall. To the extent that this analysis succeeds, as a bottom line, language minorities have a baseline right to a "fair shot" at a high school diploma. The analysis is at once modest and bold. On the one hand, the posited entitlement does not ensure that language minorities will be able to pass requirements for high school graduation or even to read. The entitlement only guarantees that states and school districts must demonstrate that they have given the language minority student a "fair shot" at a high school diploma by showing that they have adequately, affirmatively, appropriately and effectively instructed the student in all the skills, concepts and courses required for high school graduation. As such, the analysis suggests modesty. On the other hand, the analysis is somewhat bold. A simple equal educational opportunity analysis provides the language minority student with no bottomline entitlement. Previous legal analyses on the educational rights of language minorities have not addressed floors beneath which educational opportunities cannot sink. This analysis takes one important step towards guaranteeing that language minorities have such a baseline.

ENDNOTES

[1]Brown v. Board of Education 347 U.S. 483 (1954). Although there is a significant division in the legal literature as to a general right to equal educational opportunity exists under the Constitution, or whether there is merely a right to education free from racial discrimination, Brown repeatedly has been cited in support of a right to equal educational opportunity. See, e.g., Levin, "The Courts, Congress and Educational Adequacy: The Equal Protection Predicament," 39 MD. L. REV. 187 (1979), and Kutner, "Keyes v. School District Number One: A Constitutional Right to an Equal Educational Opportunity?" 8 J. LAW AND EDUC. 1 (1979), for a discussion of the Constitutional dimensions of the right to equal educational opportunity. This article does not posit a constitutional right to equal educational opportunity per se, but rather analyzes and discusses the implications of any presumed right to equal educational opportunity based on the Constitution, federal or state statutes, or a moral imperative that does not carry with it a guarantee of a floor or baseline, below which "equal" opportunity, by definition, cannot fall.

[2]Lau v. Nichols 414 U.S. 563 (1974); hereinafter referred to as Lau.

[3]Ibid. at 566.

[4]As used in this paper, "language minority" students are those national origin minority students with limited English language proficiency. This paper does not discuss what is meant by "minority" or "limited English" proficiency, but adopts this definition for purposes of the analysis herein. See generally Foster, "Bilingual Education: An Educational and Legal Survey," 5 J. LAW AND EDUC. 149 (1976); Comment, "The Legal Status of Bilingual Education in America's Public Schools: Testing Ground for a Statutory and Constitutional Interpretation of Equal Protection," 17 DUQ. L. REV. 473 (1978); Comment "The Constitutional Right of Bilingual Children to an Equal Educational Opportunity," 47 S. CAL. L. REV. 943 (1974).

[5]See generally Coleman, "The Concept of Equality of Educational Opportunity," 38 HARV. EDUC. REV. 7 (1968); Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined," 35 U. CHI. L. REV. 583 (1968); Coons, Clune and Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures," 57 CALIF. L. REV. 305 (1969); A. Wise, Rich Schools, Poor Schools: The Promise of Equal Educational Opportunity (Chicago, IL: University of Chicago Press, 1968); Michelman, "The Supreme Court, 1968 Term, Foreword: On Protecting the Poor through the Fourteenth Amendment," 83 HARV. L. REV. 7 (1969); Levin, supra, note 1; Kutner, supra, note 1. These writers provide detailed explanations and analysis of the "inputs," "outcomes" and "equal benefits" theories of educational opportunity identified in this paper. See also Lindquist and Wise, "Developments in Education Litigation," 5 J. LAW and EDUC. 1 (1976) for additional definitions.

[6]See, e.g., Serrano v. Priest 5 Cal. 3d. 584 (1971); Hobson v. Hansen 269 F. Supp. 401 (D.D.C. 1967), aff'd sub. nom. Smuck v. Hobson 408 F. 2d. 175 (1969).

[7]See text accompanying note 5 supra.

[8]See text accompanying note 5 supra. See also, e.g., Lau v. Nichols 414 U.S. 563 (1974).

[9]414 U.S. at 569. See generally Roos, "Bilingual Education: The Hispanic Response to Unequal Educational Opportunity," 42 LAW AND CONT. PROB. 111 (1978); Grubb, "Breaking the Language Barrier: The Right to Bilingual Education," 9 HARV. C.R.-C.L.L. REV. 52 (1974); Teitelbaum and Hiller, "The Legal Perspective," in Bilingual Education: Current Perspectives (Arlington, VA: Center for Applied Linguistics, 1977).

[10]414 U.S. at 566.

[11]See Levin, supra, note 1 at 225-265, and Tractenberg, "The Legal Implications of Statewide Pupils Performance Standards," ECS-MCT Workshop Paper, at 31-37, for discussion of "equal opportunity" analysis. Tractenberg and Levin make a distinction between analytic notions of equal opportunity and minimally adequate opportunity, arguing that the Equal Protection Clause of the Constitution is susceptible to both types of interpretations. See Michelman, supra, note 5 at 7, for the initial development of the idea that the Equal Protection Clause encompasses notions of adequacy and text accompanying note 5 supra. See also Preovolos, "Rodriguez Revisited: Federalism, Meaningful Access and the Right to an Adequate Education," 20 SAN. C.L.L. REV. 75 (1980).

[12]See text accompanying note 5 supra. See also Dimond, "The Constitutional Right to Education: The Quiet Revolution," 24 HAST.L.J. 1087 (1973) for a discussion of the constitutional right to a minimally adequate education implicit in the Fourteenth Amendment, although not in terms of equal opportunity analysis.

[13]In this school financing case, the court held that since education was not a fundamental right, the policies of alleged wealth discrimination which were at issue could not be subjected to strict scrutiny under equal protection analysis, San Antonio Independent School District v. Rodriguez 411 U.S. 1, 35 (1973).

[14]Id. at 37.

[15]Id. at 35-36. See Preovolos, supra, note 11, for a thorough discussion of the Rodriguez decision's implications for adequate education. See also Roos, "The Potential Impact of Rodriguez on Other School Reform Litigation," 38 LAW AND CONT. PROB. 566 (1974).

[16]U.S. CONST. amend. XIV, § 1; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1976); The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (1976).

[17]Lau v. Nichols, 414 U.S. 563 (1974); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1976); May 25th Memorandum, 35 Fed. Reg. 11595 (1970); The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (1976).

[18]U.S. CONST. amend. XIV, § 1.

[19]All states and school districts have in some sense defined baseline educational opportunities insofar as they mandate, by law or administrative regulation, those things which a student must do and know in order to graduate from high school. See, e.g., Con. Laws of N.Y. Ann. Art. 65 § 3204; Fla. Stat. Ann. Tit. 15 § 233.061 et seq. A recent federal court decision specifies what states must do in order to provide a baseline educational opportunity in the minimum competency testing context. Debra P. V. Turlington 474 F. Supp. 24 (1979); aff'd in part, vac. in part, rem'd 644 F. 2nd 397 (1981).

[20]U.S. CONST. amend. XIV.

[21]See generally G. Gunther, Constitutional Law (New York, NY: The Foundation Press, Inc., 1980).

[22]In San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 37, the court held that education is not a fundamental interest and that laws which affect and impinge on education are not necessarily entitled to strict judicial scrutiny. However, for the purposes of this analysis, it is not necessary to recognize "students" as a suspect class, or educations as a fundamental interest, in order to afford students some protection pursuant to the Equal Protection Clause. Minimally, a state's activity must bear a rational relationship to a legitimate state interest if it discriminates between people on any basis. See, e.g., Debra P. v. Turlington, note 19 supra.

[23]Weston, HARV. L. REV. (1982), and citations therein.

[24]Levin, supra, note 1.

[25]See, e.g., Michelman, supra, note 5, and Preovolos, supra note 11, for a discussion of some underlying substantive rights that are required to give the concept of equality true meaning. See also Note, "The Right to Education: A Constitutional Analysis," 44 CIN. L. REV. 796 (1975) and Weston, supra, note 23.

[26]See text accompanying note 25 supra.

[27]Although this line of analysis is developed in this paper, see Preovolos, supra, note 11, for a discussion of the implications of the Rodriguez decision for adequate education. Although there is a continuing debate over whether or not "equal" opportunity involves some minimum level of "adequate" opportunity, issues specific to language minority students have not been explored in this debate. See Levin, supra, note 5, for a preliminary discussion of problems associated with

the inability of the Equal Protection Clause to address issues of educational adequacy for language minority and other students, using examples drawn from school finance cases in an effort to establish some sort of baseline standard.

[28]42 U.S.C. § 2000(d) (1976).

[29]35 Fed. Reg. 11595 (1970).

[30]Id.

[31]20 U.S.C. § 1703(f) (1976).

[32]This paper argues that the equal treatment guarantees for language minority students embodied in certain federal statutes also require the recognition of a right to some baseline level of opportunity. Although not specifically in support of these points, see generally, Benjes, Heubert and O'Brien, "The Legality of Minimum Competency Test Programs under Title VI of the Civil Rights Act of 1964," 15 HARV. C.R.-C.L.L. REV. 537 (1980) for a discussion of potential statutory challenges to unequal treatment.

[33]414 U.S. at 566.

[34]Id. at 565.

[35]35 Fed. Reg. 11595, 11596. See also text accompanying note 9 supra.

[36]Id.

[37]Id.

[38]73 F.R.D. 589, 592 (E.D.N.Y., 1977); 480 F. Supp. 14 (E.D.N.Y. 1978).

[39]73 F.R.D. at 595.

[40]Id.

[41]648 F. 2nd 989 (1981).

[42]20 U.S.C. § 1703(f) (1976).

[43]Id.

[44]648 F. 2nd 1010 (1981).

[45]Id. at 1014.

[46]Id. at 1010

[47]Id.

[48]455 F. Supp. 57 (E.D.N.Y. 1978).

[49]Id. at 63.

[50]Id. at 63. The Cintron Court required adherence by the school district in this case to the "Lau Remedies." The "Lau Remedies" are unofficial guidelines specifying instructional methods (e.g., bilingual or ESL instruction) appropriate for use in those school districts that were out of compliance with Lau by virtue of doing nothing to address the specific needs of language minority students. Although the "Remedies" are not legally binding on school districts as a Title VI compliance guideline, the Office of Civil Rights (OCR), and the courts, in some instances, have used the guidelines to assess school district efforts to instruct language minority students. The federal government has attempted to replace the "Remedies" with official Title VI language minority regulations, although the most current proposed regulations (N.P.R.M) have been withdrawn from comment. The May 25th Memorandum currently provides legally binding guidance as to what constitutes "appropriate" education for language minority students, although it does not address the language of instruction issues.

[51]U.S. v. Texas.

[52]Id.

[53]U.S. CONST. amend. XIV, § 1.

[54]See text accompanying note 21 supra.

[55]Goss v. Lopez, 419 U.S. 565 (1975).

[56]See Note, "Educational Malpractice and a Right to Education: Should Compulsory Education Laws Require a Quid Pro Quo?" 21 WASHBN. L.J. 555 (1982), for a discussion of several types of "liberty" interests in this connection. See also Dimond, supra, note 12, at 1110-1111.

[57]Id.

[58]Debra P. v. Turlington 474 F. Supp. 24 (1979); aff'd in part, vac. in part, rem'd 644 F. 2nd 397 (1981).

[59]See text accompanying note 19 supra.

[60]Id.

[61]See W. Gorth and M. Perkins, A Study of Minimum Competency Testing Programs: Final Comprehensive Report (Amherst, MA: National Evaluation Systems, Inc., 1979), for a comprehensive analysis of state minimum competency testing programs. See also C. Pipho, State Minimum Competency Testing Programs: Analysis of State Minimum Competency Testing Programs (Denver, CO: Education Commission of the State, 1980).

[62]Id.

[63]See McClung, "Competency Testing Programs: Legal and Educational Issues," 47 FORDHAM L. REV. 65 (1979). See also Pullin, supra note 65. See also Popham and Lindham, "Implications of a Landmark Ruling on Florida's Minimum Competency Test," 65 PHI DEL. KAP. 18 (1981); G. Madaus, The Courts, Validity, and Minimum Competency Testing (oston, MA: Kluwer Publications, 1982).

[64]474 F. Supp. at 266.

[65]474 F. Supp. 244. For a thorough discussion of the Debra P. decisions, see Pullin, "Debra P. v. Turlington: Judicial Standards for Addressing the Validity of Minimum Competency Test," in Madaus (Ed.), The Courts, Validity and Minimum Competency Tests (Boston, MA: Kluwer Publications 1982). See also Lewis, "Certifying Functional Literacy: Competency Testing and Implication for Due Process and Equal Educational Opportunity," 8 J. LAW AND EDUC. 145 (1979), and Clague "Competency Testing and Potential Challenges of 'Every student,'" 28 CATH. U.L.R. 469 (1979).

[66]644 F. 2nd at 404.

[67]Id. at 404-407.

[68]Id. at 409.

[69]See text accompanying note 63 supra.

[70]644 F. 2nd at 404-407.

[71]Id.

[72]A cause of action analogizing curricular course requirements to test requirements in the context of Debra P. has not been advanced nor recognized by the courts. The Debra P. court was extending current notions of test validity beyond existing case law and the current American Psychological Association's testing standards; see G. Madaus, supra, note 63. Thus, is hard to say whether a court could be persuaded to recognize the argument that "fundamental fairness" also requires that students be instructed in the course requirements for high school graduation. It is, however, a plausible analogy and as such is considered an integral component of the language minority student's entitlement or "fair shot," as defined in this paper.

[73]644 F. 2nd at 406, cited in Memorandum Opinion, U.S. District Court, Middle District of Florida, Tampa Division, Case No. 78-892-Civ-T-GC (Debra P. remand, May 4, 1983).

[74]The Rodriguez court left open the question of whether local baseline graduation requirements are constitutionally-sufficient, and recent decisions in the area of minimum competency testing have not dealt with the constitutionality of the level at which standards are set.

[75]See, e.g., Lau v. Nichols 414 U.S. 563 (1974).

[76]See text accompanying note 56 supra. See also Note, "Educational Malpractice: Can the Judiciary Remedy the Growing Problem of Functional Illiteracy?" 13 SUFF. U.L.R. 27 (1979); Note, "Educational Malpractice," 1 WEST. N.E.L.R. 759 (1979(; and Latner, "Remedying Failure to Teach Basic Skills: Preliminary Thoughts," 17 INEQ. IN EDUC. 15 (1974). See, e.g., Peter W. v. San Francisco Unified School District 60 Cal. App. 3d. 814 (1976).

[77]Prosser, HANDBOOK OF THE LAW OF TORTS (1971) at 325-326.

[78]See, e.g., Peter W., cited in note 75 supra. See also Donohue v. Copiague Union Free School District 64 A.D. 2nd 29 (1978).

[79]According to Prosser, supra, note 77, once the duty to the student is established, the student must demonstrate that the school district failed to conform to the standard of conduct required for the student's protection. In addition, the district's conduct, and not some intervening, "outside" factor must be the cause of the harm, i.e., failure, suffered by the student. The argument, as outlined in this paper, that language minority students have a right to a baseline education, or a "fair shot at a high school diploma," can be thought of in terms of a potential action for educational malpractice as it encompasses the elements of duty, breach and resulting harm.

[80]See text accompanying note 32 supra.